STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. SCHREINER and LAURA L. SCHREINER, Plaintiffs-Appellants, v RICHARD FRANCIS and JANET FRANCIS, Defendants-Appellees.	UNPUBLISHED April 14, 2005 No. 252058; 255783 Oakland Circuit Court LC No. 2000-025909-CH

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from two judgments entered in a boundary line dispute. After a bench trial, the court entered a judgment of no cause of action and, in a subsequent proceeding, sanctioned plaintiffs for a frivolous action, awarding defendants $53,000 in attorney fees and costs. This Court consolidated the appeals. We affirm the judgment of no cause of action but reverse the imposition of sanctions.

This Court described the property involved in its previous opinion, which reversed the trial court's grant of summary disposition for defendants:

> Three property lines are at the center of the controversy: Line A, the original lot line of lot 9 as recorded in the original legal description to this property; Line B, the new legal boundary after the subsequent conveyance; and Line C, the line thought by plaintiffs to be the boundary after the subsequent conveyance. The disputed parcel lies between Lines B and C and is termed the "gap area" by plaintiffs. The distance from Line A to Line C is approximately eight feet. Plaintiffs own the land to the right of the disputed area (lot 9) and defendants own the land to the left (lot 8). [*Schreiner v Francis*, unpublished opinion per curiam, December 17, 2002 (Docket No. 237160), slip op 1, n 1.]

After the remand, the case was tried without a jury. Plaintiffs claimed they would show that they had acquired title to the gap area by acquiescence arising out of "intention to deed to a specific line[,] through statutory acquiescence[,] and perhaps through an agreement" referring to an agreement between plaintiffs and Robert Leahy, the contractor who built defendants' home on what was then an empty lot. Plaintiffs also stated that the evidence would show that both parties treated the boundary between the two driveways as the actual boundary line between the parcels

since the late 1960s, which would also allow the court to find acquiescence for the statutory period. Plaintiffs claimed in the opening statement that Leahy caused the dispute by making an error when staking the boundary.[1]

The court found that the claim on which plaintiffs' entire case depended – that builder Leahy drove stakes in the ground along a line terminating at Point C, telling plaintiffs that they would acquire the land up to that line – "is simply not credible." The court's factual findings are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Plaintiffs advance four theories for reversing the trial court on this issue, each of which will be considered separately.

Plaintiffs first argue that the court erred by refusing to admit testimony concerning statements that Leahy made to plaintiffs when discussing a sale of a small parcel of what became defendants' lot to plaintiffs. Evidentiary issues are reviewed for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003). An abuse of discretion occurs when an unbiased review of the facts on which the court acted leads to the conclusion that there was no justification or excuse for the court's ruling. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004). Here, a review of the transcript and the court's opinion shows that, although the court sustained defendants' objection to the testimony, the court received, considered, and weighed the testimony when it found that "plaintiffs' claim that Mr. Leahy informed them that he would give up the property to Line C is simply not credible." The court permitted plaintiffs to make a separate record of the proffered testimony, which they also referred to when opposing defendants' motion to dismiss and during closing argument. Therefore, the statements were not, in fact, excluded, and plaintiffs have not shown that the court abused its discretion.

Moreover, even if the evidence was erroneously excluded, the erroneous exclusion of evidence did not require reversal unless it affected a party's substantial rights. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). According to the separate record, the substance of Mr. Leahy's statements was that the location of the stakes represented the area he thought he could give up – so that plaintiffs could have a driveway – while still preserving his ability to build a house, he did not have a problem increasing the area around the tree in plaintiffs' yard, and he discussed building a common driveway but instead built his own driveway along the property line because he had a production schedule to keep. Assuming arguendo that this evidence was erroneously excluded, plaintiffs have not demonstrated prejudice because they were permitted to present evidence that Leahy had staked the driveway before they arrived; when they did not agree to the location of the stakes because they could not negotiate around the retaining wall and tree, Leahy moved the stakes; and Leahy constructed a driveway, containing a curve, along the line plaintiffs understood to be the new boundary line between the lots. Therefore, plaintiffs were permitted to present their theory of the case without the excluded

[1] Defendants' property, Lot 8, is to the north of plaintiffs' lot, Lot 9. The driveway at the center of the dispute runs generally west to the street on the west side of the lots.

statements, and they have not indicated otherwise how they were prejudiced by the statements' exclusion.

Plaintiffs next argue that the court erred by taking judicial notice of the local lot-split ordinance, which defendants sought to introduce to show that plaintiffs never thought they had title to the disputed strip of land. However, "[a] court may take judicial notice without request by a party of . . . ordinances and regulations of governmental subdivisions or agencies of Michigan." MRE 202(a). After defendants argued that the ordinance was relevant to rebut plaintiffs' claim that they acquired the parcel because plaintiffs failed to comply with the ordinance, the court found that the ordinance was relevant but indicated it would decide how much weight to give the evidence. Therefore, the court considered the relevance of the ordinance, and admitting the lot-split ordinance was not an abuse of discretion. Moreover, even if the ordinance was irrelevant, there is no indication that its admission affected the trial court's decision in granting judgment to defendants. Therefore, plaintiffs cannot establish that the admission of the ordinance affected a substantial right. See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), quoting *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988) ("'A judge, unlike a juror, possesses an understanding of the law which allows him to ignore [evidentiary] errors and to decide a case based solely on the evidence properly admitted at trial'").

Plaintiffs next argue that the court clearly erred by finding defendant Richard Francis credible, while finding plaintiffs' claim not credible. This case basically involved a credibility contest between plaintiffs and defendants. Plaintiffs claimed that the parties operated under a mutual mistake for more than thirty years with respect to the location of the actual boundary, while defendants claimed they always knew the location of the actual boundary and merely permitted plaintiffs to use a portion of their driveway as friends and neighbors. "An appellate court will give deference to 'the trial court's superior ability to judge the credibility of the witnesses who appeared before it.'" *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003), quoting *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989). The trial court found defendants' version of events more credible because it was supported by surveys, a deed, and a letter from plaintiffs' attorney. In contrast, the court found plaintiffs' version of events uncorroborated. After reviewing the record, we are not left with a definite and firm conviction that the trial court made a mistake. *Walters*, *supra* at 456.

Plaintiffs are correct in arguing that, had Leahy agreed to give plaintiffs the land they claimed, defendants' non-agreement would be irrelevant. However, the court's comment that "[E]ven if Mr. Leahy had agreed to give up the property to plaintiffs, defendants did not so agree" is dicta. The rule is that "an error in a ruling or order . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). In this case, the court's critical determination – "that plaintiffs have not established a mutual mistake" – preceded the objectionable dicta. Therefore, the comment was harmless.

Plaintiffs next appeal the award of sanctions for bringing a frivolous action. Absent specific statutory authority, court rule, or precedent, each side generally pays for its own attorney fees and costs. *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 426-427; 528 NW2d 749 (1995). In this case, the court cited the statute on frivolous suits, MCL 600.2591, as the

basis for an award of sanctions to defendants. The court found that sanctions were justified under the statute:

> Upon review of the record and the arguments of the parties, the Court is of the opinion that Plaintiffs' claim was frivolous as contemplated by MCL 600.2591(3)(a). Specifically, Plaintiffs' claims were not well-grounded in fact and were devoid of legal merit. The Court does not find, however, that Plaintiffs' primary purpose was to harass Defendants. Rather, the Court is of the opinion that Plaintiffs' primary purpose was to obtain Defendants' land, based on a claim that is devoid of merit. [Emphasis in original.]

"A trial court's finding that an action is frivolous is reviewed for clear error. A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002), citing *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). With respect to the court's finding that plaintiffs' claim was devoid of legal merit,[2] a claim or defense is devoid of arguable legal merit when there clearly are no legal grounds to support it. See *Taylor v Lenawee Co Bd of Rd Comm'rs*, 216 Mich App 435, 444-446; 549 NW2d 80 (1996), *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 267-268; 548 NW2d 698 (1996), and *Kitchen, supra* at 662-663. Because Michigan recognizes three separate theories of possession through the doctrine of acquiescence, *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996), we find that the trial court clearly erred in concluding that plaintiffs' claims were devoid of arguable legal merit.

With respect to the trial court's finding that plaintiffs' claims were not well grounded in fact, the court found that "Plaintiffs' position was untenable" because plaintiffs could not show either "mutual mistake in the initial boundary;" nor could plaintiffs show "proof of an agreed-to boundary line," which is "crucial to a claim of acquiescence." However, a failure to prove one's case at trial is not grounds for finding that the claim was frivolous. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). The relevant inquiry is whether the claim or defense was frivolous at the time it was asserted. *Id.* Here, the trial court stated:

> As noted in the Court's October 20, 2003 Opinion, in order to support their claim for acquiescence under any of the three theories, Plaintiffs were required to show mutual mistake in the initial boundary. [*Walters, supra.*] In addition, proof of an agreed-to boundary line is crucial to a claim of acquiescence. *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974).

After reviewing the record, we find that plaintiffs presented sufficient evidence that, if believed, would have allowed them to prevail in their acquiescence claim. Plaintiffs testified that defendants' predecessor Leahy erroneously staked the northwest corner of lot 8[3] approximately

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[2] We note that the correct standard is whether the claim is devoid of arguable legal merit. MCL 600.2591(3)(a)(*iii*). However, this distinction does not affect our analysis of this issue.

[3] The northwest corner of lot 8 marked the northerly boundary of defendants' parcel, not the (continued…)

four feet north of the location of the actual iron. This would have explained Leahy's erroneous staking of the area to be conveyed, which would have covered the area now in dispute. Plaintiffs testified that the staked area was located in plaintiffs' gravel driveway and testified that the location of the driveway had not moved since the conveyance. The area that was actually conveyed in the deed was not located in the driveway. This established a mutual mistake with respect to the new boundary line the parties intended to establish. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). Moreover, after the conveyance, plaintiffs testified, Leahy paved his driveway along the previously staked arc in the driveway, and plaintiffs later paved their portion. The parties then treated this as the boundary line for the next thirty years as evidenced by the fact that when defendants recapped their driveway, they did not recap the disputed portion. Thus, the parties treated this division in the driveway as the boundary line between their properties. *Walters, supra* at 458. Although the court ultimately found defendants' version of events more credible, we are firmly convinced that plaintiffs presented sufficient evidence to avoid sanctions. *Jerico Constr, Inc, supra* at 36.

The judgment of no cause of action is affirmed but the imposition of sanctions is reversed. In light of our decision to affirm the judgment of no cause of action, we need not reach plaintiffs' argument that the case should be remanded to a different trial judge.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens

(…continued)

southerly boundary between defendants' parcel and plaintiffs' parcel.